

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
June 9, 2008 Session

GILBERT WATERS, ET AL. v. WESLEY COKER, M.D.

Appeal from the Circuit Court for Davidson County
No. 01C-1433 Hamilton V. Gayden, Jr., Judge

No. M2007-01867-COA-RM-CV - Filed August 28, 2008

In this medical malpractice action, both parties appeal from a jury verdict entered in favor of the defendant. The plaintiffs appeal the trial court's denial of the plaintiffs' motion to amend the Complaint to add a claim for informed consent and the denial of the plaintiffs' motions *in limine* to exclude two of the defendant's expert witnesses. In addition, the plaintiffs contend the trial court committed reversible error by failing to properly instruct the jury. We have determined the trial court applied the correct legal standard when it considered the plaintiffs' motion to amend and that reasonable minds could disagree as to the propriety of the trial court's decision; therefore, the trial court did not abuse its discretion in denying the late filed motion to amend. We also find no error with the trial court's decision to deny the plaintiff's motions *in limine*, thus allowing the defendant's expert witnesses to testify. Further, we find the plaintiffs failed to request an additional jury instruction after an incomplete charge was given, thus the issue has been waived. Accordingly, we affirm the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which ANDY D. BENNETT and RICHARD H. DINKINS, JJ., joined.

Robert L. Trentham, Taylor B. Mayes and James A. Beakes III, Nashville, Tennessee, for the appellant, Wesley Coker, M.D.

Larry D. Ashworth, Nashville, Tennessee, for the appellees, Gilbert and Hixie Waters.

OPINION

After suffering a work-related back injury, Gilbert Waters, who was 67 years old at the time, went to see Wesley Coker, M.D., an orthopaedic surgeon, for an evaluation. Based on the examination as well as the results from prior testing, Dr. Coker diagnosed Mr. Waters as suffering from degenerative disc disease, possible nerve root irritation, and a large disc herniation. When other treatment did not resolve the pain, Dr. Coker recommended that Mr. Waters undergo a lumbar

laminectomy surgical procedure to address the herniated disc. Thereafter, Dr. Coker scheduled Mr. Waters to have surgery at Saint Thomas Hospital.

Mr. Waters underwent decompressive lumbar laminectomy surgery performed by Dr. Coker on May 15, 2000. As part of the procedure, Dr. Jane Thomas, an anesthesiologist, administered general anesthesia. Dr. Thomas also administered fentanyl, a narcotic used to relieve the immediate pain for patients having a breathing tube inserted. The narcotic was administered in a dose sufficient to provide pain relief throughout the duration of the surgical procedure.

At the conclusion of the surgery, Dr. Coker intrathecally¹ administered a combined dose of fentanyl and astringorph (morphine) for post-operative pain control. Immediately following surgery, Mr. Waters went to a Post-Anesthesia Care Unit and thereafter was moved to a private room. Approximately two-and-a-half hours after arriving in his room, Mr. Waters was discovered somnolent, bradycardic, hypotensive, hypoxemic, and generally lifeless. A code was called, and Mr. Waters was transferred to a special care unit. His oxygen saturation level was in the twenty percent range, where the normal percentage range is 92 to 100. A CT scan of Mr. Waters' brain taken twenty-three hours after this incident revealed front atrophy with no indication of intercerebral hemorrhage.

Mr. Waters and his wife (the "plaintiffs") filed this medical malpractice action on May 14, 2001, against Saint Thomas Hospital, the attending anesthesiologist, the attending certified nurse anesthetist, and their practice groups. Two weeks later, the plaintiffs filed an amended complaint adding Dr. Coker as an additional defendant. Subsequently, all defendants except Dr. Coker were dismissed on summary judgment. On November 20, 2003, the plaintiffs filed a summary judgment motion against Dr. Coker. In support of the motion, the plaintiffs contended that they were "entitled to summary judgment against Defendant Wesley Coker, M.D. on the issues of failure to secure informed consent and liability for the injuries suffered by Plaintiff Gilbert Waters on May 15, 2000." On January 12, 2004, Dr. Coker filed a response in opposition to summary judgment raising the issue that the plaintiffs had not pled lack of informed consent as a cause of action.

Two days after Dr. Coker filed his response in opposition to summary judgment, the plaintiffs filed a Motion to Amend pursuant to Rule 15.01 of the Tennessee Rules of Civil Procedure to include a claim for lack of informed consent and battery. On January 30, 2004, the trial court entered an Order denying the plaintiffs' Motion to Amend "due to the plaintiffs' undue delay in seeking the proposed amendments which would require additional expert testimony and the undue prejudice to Dr. Coker that would occur if the proposed amendments were allowed this close to the scheduled trial date of February 9, 2004."

Following a two-week jury trial, a verdict was returned resolving all issues in favor of Dr. Coker. The order rendering the jury's verdict of the judgment of the court was entered on March 10,

¹ Medications administered intrathecally are injected directly into the fluid filled sac or membrane that surrounds the spinal cord and the brain.

2004. Dr. Coker filed a motion for the court to award him discretionary costs, and the plaintiffs filed a Motion for New Trial or in the Alternative for a Judgment Notwithstanding Verdict. The trial court denied both motions.

Thereafter, Dr. Coker timely appealed the trial court's denial of his motion for discretionary costs. The plaintiffs also appealed, raising several grounds for reversal including the trial court's denial of their motion to amend the Complaint to include informed consent, the trial court's denial of their motion to exclude two of defendant's expert witnesses, erroneous jury instructions, error in giving a portion of the jury instructions outside the presence of counsel and the parties, and error in providing the divided jury with a variation of the "dynamite charge."

Following oral arguments, this court determined that the instruction of the so-called "dynamite charge" constituted reversible error for which the judgment of the trial court was vacated. *Waters v. Coker*, No. M2004-01540-COA-R3-CV, 2006 WL 1816240, at *8 (Tenn. Ct. App. June 29, 2006), *rev'd*, 229 S.W.3d 682 (Tenn. 2007). We also determined that the issue of the dynamite charge was dispositive of all other issues; therefore, the remaining issues were not discussed. *Id.* at *6 -7. Prior to the mandate issuing, Dr. Coker filed a Rule 11 application for permission to appeal our decision to the Tennessee Supreme Court, which the Supreme Court granted.

In an opinion filed June 29, 2007, the Tennessee Supreme Court determined that the plaintiffs had waived the issue concerning the dynamite charge by failing to raise it as a ground for relief in their Motion for New Trial in the trial court. *Waters v. Coker*, 229 S.W.3d 682, 690 (Tenn. 2007). The plaintiffs then filed a Petition to Rehear with the Supreme Court. On August 16, 2007, the Supreme Court denied the petition to rehear but granted the plaintiffs' request that the remaining pretermitted issues be remanded to this court for further consideration.

Accordingly, the following issues, which were pretermitted in our first opinion in this matter, are now before this court: (1) whether the trial court abused its discretion in denying the plaintiffs' Motion to Amend their complaint to add a claim for lack of informed consent, (2) whether the trial court abused its discretion in denying the plaintiffs' motions *in limine* to exclude Dr. Coker's expert witnesses, Dr. Alfred Callahan and Dr. Theodore Larson, (3) whether the trial court committed reversible error by failing to properly instruct the jury on the burden of proof and preponderance of the evidence and by failing to give the jury charge that was announced as the approved charge, (4) whether the trial court committed reversible error by giving the jury a portion of the charge outside of the presence of the parties and their counsel, and (5) whether the trial court erred by denying Dr. Coker's motion for discretionary costs. We will discuss each issue in turn.

ANALYSIS

DENIAL OF PLAINTIFFS' MOTION TO AMEND COMPLAINT

The plaintiffs contend the trial court erred by denying their motion to file their Second Amended Complaint pursuant to Rule 15.01 of the Tennessee Rules of Civil Procedure two weeks prior to the commencement of what became a two-week jury trial. We have determined the trial court applied the correct legal standard and that reasonable minds could disagree as to the propriety of the trial court's decision. Accordingly, the trial court did not abuse its discretion in denying the plaintiffs' motion to amend.

The motion to amend was filed pursuant to Tenn. R. Civ. P. 15.01, which provides:

A party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within 15 days after it is served. Otherwise a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires.

We review a trial court's ruling on a motion to amend a pleading pursuant to Tenn. R. Civ. P. 15.01 under an abuse of discretion standard. *State v. McCrary*, No. W2005-02881-COA-R3-JV, 2006 WL 1864502, at * 6 (Tenn. Ct. App. July 6, 2006) (no Tenn. R. App. P 11 application filed); (citing *Merriman v. Smith*, 599 S.W.2d 548, 559 (Tenn. Ct. App. 1979)).

Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining." The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court.

Eldridge v. Eldridge, 42 S.W.3d 82, 85 (Tenn. 2001) (citations omitted).

"A plethora of cases illustrates the willingness of Tennessee courts to permit amendments under Rule 15.01." *Freeman Indus., LLC v. Eastman Chem. Co.*, 227 S.W.3d 561, 566 (Tenn. Ct. App. 2006) (citing *Branch v. Warren*, 527 S.W.2d 89 (Tenn. 1975); *Tennessee Dept. of Mental Health & Mental Retardation v. Hughes*, 531 S.W.2d 299 (Tenn. 1975); *Matus v. Metro. Gov't of Nashville*, 128 S.W.3d 653 (Tenn. Ct. App. 2003); *Coker v. Redick*, No. 01-A-01-9410-CH-00500, 1995 WL 89706 (Tenn. Ct. App. March 3, 1995); *HMF Trust v. Bankers Trust Co.*, 827 S.W.2d 296 (Tenn. Ct. App. 1991); *Harris v. St. Mary's Med. Ctr.*, 726 S.W.2d 902 (Tenn. Ct. App. 1987); *Garthright v. First Tennessee Bank of Memphis*, 728 S.W.2d 7 (Tenn. Ct. App. 1986)).

The rule means precisely what it says, that “leave shall be freely given when justice so requires.” *Branch v. Warren*, 527 S.W.2d 89, 92 (Tenn. 1975) (quoting Tenn. R. Civ. P. 15.01). The rule, however, does not state that “leave shall be given,” it states that “leave shall be *freely* given.” See Tenn. R. Civ. P. 15.01 (emphasis added). Moreover, once a responsive pleading has been filed, the party’s entitlement to amend as a matter of right, without leave of the court or consent of the adverse party, is terminated. *Keweenaw Bay Indian Cmty. v. State of Michigan*, 11 F.3d 1341, 1348 (6th Cir. 1993). Accordingly, after a responsive pleading is filed, a party is only entitled to amend a pleading with leave of court, which may be granted or denied by the trial court in its discretion. *Id.*; Tenn. R. Civ. P. 15.

In considering a motion to amend, a trial court is to consider several factors. One of those factors is “undue delay in filing the amendment.” *Green v. Green*, No. M2006-02119-COA-R3-CV, 2008 WL 624860, at * 9 (Tenn. Ct. App. Mar. 5, 2008) (no Tenn. R. App. P. 11 application filed) (quoting *Gardiner v. Word*, 731 S.W.2d 889, 891-92 (Tenn. 1987)). Ordinarily, delay alone does not justify denial of leave to amend. *Morse v. McWhorter*, 290 F.3d 795, 800 (6th Cir. 2002); (citing *Sec. Ins. Co. v. Kevin Tucker & Assocs., Inc.*, 64 F.3d 1001, 1009 (6th Cir. 1995); *Tefft v. Seward*, 689 F.2d 637, 639 n.2 (6th Cir.1982)); however, at some point “delay will become ‘undue,’ placing an unwarranted burden on the court, or will become ‘prejudicial,’ placing an unfair burden on the opposing party.” *Id.* (citing *Adams v. Gould*, 739 F.2d 858, 863 (3d Cir. 1984)). When amendment is sought at a late stage in the litigation, there is an increased burden to show justification for failing to move earlier. *Wade v. Knoxville Utilities Bd.*, 259 F.3d 452, 459 (6th Cir. 2001) (citing *Duggins v. Steak ‘N Shake, Inc.*, 195 F.3d 828, 834 (6th Cir. 1999)).

The plaintiffs filed this medical malpractice action on May 14, 2001, and the Complaint was amended at least once previously, when the plaintiffs filed an Amended Complaint adding Dr. Coker as an additional defendant. The trial of this case, which was anticipated to be a two-week jury trial, was set to begin on February 9, 2004. On January 14, 2004, the plaintiffs filed a motion to amend their Amended Complaint to add a claim for lack of informed consent and battery.² The motion came on for hearing on January 23, 2004, following which the trial court entered an Order denying the Motion to Amend “due to the plaintiffs’ undue delay in seeking the proposed amendments which would require additional expert testimony and the undue prejudice to Dr. Coker that would occur if the proposed amendments were allowed this close to the scheduled trial date of February 9, 2004.”

The motion at issue was the third time the plaintiffs had sought to amend the Complaint. In the motion, as first filed, the plaintiffs stated “the issues of informed consent and battery have been tried since the inception of this matter.” Dr. Coker, however, took exception with this statement in his response in opposition to the motion to amend, stating *inter alia*, “the case has been pending for over two and a half years and now, less than three (3) weeks before trial, the plaintiffs ask this Court

²The plaintiffs filed a Motion for Summary Judgment on the issue of informed consent. Dr. Coker responded to the motion stating that “[a] review of the plaintiffs’ Amended Complaint indicates that the plaintiffs have not plead lack of informed consent as a cause of action against Dr. Coker,” and, “[t]herefore, the plaintiffs’ Motion for Summary Judgment on the issue of informed consent should be summarily denied.”

for permission to assert claims of lack of informed consent and battery . . .” and that the “plaintiffs have offered no explanation for the undue delay in seeking the proposed amendments or for their repeated failures to cure deficiencies in their pleadings.” In reply, the plaintiffs stated, *inter alia*, “there have been numerous questions asked of all the parties regarding informed consent and battery. It is mere oversight and excusable neglect that counsel for Plaintiffs had failed to amend the pleadings and formally plead these issues.”

In *Hall v. Shelby County Retirement Bd.*, 922 S.W.2d 543, 546 (Tenn. Ct. App. 1995), this court found a motion to amend that was not filed until approximately three and a half years after the original petition was filed constituted an undue delay and that the trial court did not abuse its discretion in denying the motion to amend. The Court explained:

There are several considerations a trial judge should evaluate in determining whether to grant or deny a motion to amend. Among these factors are undue delay in filing, lack of notice to the opposing party, bad faith by the moving party, repeated failure to cure deficiencies by previous amendments, undue prejudice to the opposing party, and futility of amendment. *Merriman*, 599 S.W.2d at 559.

Petitioner has failed to persuade this Court that the chancellor abused his discretion in denying his motions to amend. In light of the factors delineated above, we find ample justification for the actions of the trial court in denying such motions. In the present case, Petitioner did not file his motions to amend until approximately three and a half years after his original petition was filed. The motions were thus untimely, thereby constituting an undue delay in filing. Moreover, because Petitioner sought to add several additional claims, a court’s allowance of the amendments would unduly prejudice the Board. Finally, the amendments would be futile because granting them would only prolong the litigation and would almost certainly not lead to a contrary ultimate result.

Hall, 922 S.W.2d at 546.

The trial court identified undue delay and undue prejudice to Dr. Coker as reasons for denying the Motion to Amend.³ Undue delay and undue prejudice are factors to be considered when deciding whether to deny a motion to amend. *Green*, 2008 WL 624860, at * 9; *Gardiner*, 731 S.W.2d at 891-92. Accordingly, the trial court applied the correct legal standard. Considering the fact that the case had been pending for three years when the motion was filed, that a two-week jury trial was to commence three weeks after the motion was filed, that numerous depositions had been taken, and the fact the plaintiffs’ explanation why the motion to amend had not been filed previously

³In denying leave to amend, abuse of discretion may occur when the court does not state the basis for its denial. *Morse v. McWhorter*, 290 F.3d 795, 799 -800 (6th Cir. 2002) (citing *Moore v. City of Paducah*, 790 F.2d 557, 559 (6th Cir.1986)).

was excusable neglect, we have determined that reasonable minds could disagree as to the propriety of the decision to deny the motion to amend.

Having determined that the trial court applied the correct legal standard and that reasonable minds could disagree as to the propriety of the trial court's decision, we therefore conclude that the trial court did not abuse its discretion in denying the late filed motion to amend. *See Eldridge*, 42 S.W.3d at 85. Accordingly, we affirm the trial court's decision to deny the plaintiffs' Motion to Amend.

DENIAL OF MOTIONS *IN LIMINE* TO EXCLUDE DEFENDANT'S EXPERT WITNESSES

The plaintiffs contend the trial court abused its discretion in denying their motions *in limine* to exclude two of Dr. Coker's expert witnesses, Dr. Alfred Callahan and Dr. Theodore Larson. The plaintiffs contend that Dr. Callahan should not have been permitted to testify because his "pre-trial disclosures [responses to Tenn. R. Civ. P. 26.02(4) interrogatories] and deposition testimony changed repeatedly to such a degree as to demonstrate untrustworthiness." They contend Dr. Larson should not have been permitted to testify because his deposition was not scheduled until four weeks prior to trial, in violation of the Amended Scheduling Order, causing undue prejudice.

The admissibility of expert testimony is within the discretion of the trial court. *State v. Ballard*, 855 S.W.2d 557, 562 (Tenn. 1993). On appeal, the trial court's ruling on whether to permit or exclude such testimony may only be overturned if the discretion is arbitrarily exercised or abused. *Id.* Under the abuse of discretion standard, a trial court's ruling "will be upheld so long as reasonable minds can disagree as to the propriety of the decision made." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Id.*

The fact that an expert witness who has responded to a request for discovery subsequently changes the substance of that testimony during the course of litigation is not uncommon. To the contrary, it occurs with such regularity that such a circumstance is contemplated under Tennessee Rule of Civil Procedure 26.05. The Rule establishes the duties of the parties and the procedure by which a party is to disclose changes in the testimony of an expert witness. Subsection (1) of Rule 26.05 instructs that a party who provided a response to a request for discovery "is under a duty seasonably to supplement the party's response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters; and (B) *the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of that testimony.*" Tenn. R. Civ. P. 26.05(1) (emphasis added). The Rule goes on to instruct in subsection (2) that "a party is under a duty seasonably to amend a prior response if the party obtains information upon the basis of which the party (A) knows that the response was incorrect when made; or (B) knows that the response though

correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.” Tenn. R. Civ. P. 26.05(2).⁴

If the trial court determines that scientific or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise. Tenn. R. Evid. 702. The trial court, however, shall disallow opinion testimony “if the underlying facts or data indicate lack of trustworthiness.” Tenn. R. Evid. 703 (emphasis added).

Although Dr. Callahan changed the substance of his testimony, and the facts upon which it was based, on more than one occasion prior to trial, and as the plaintiffs categorized it, his testimony constituted “a moving target,” the trial court did not find the “underlying facts or data” upon which his opinion was based untrustworthy. Such a determination constitutes a discretionary decision, which will be upheld so long as reasonable minds can disagree as to the propriety of the decision. *See Ballard*, 855 S.W.2d at 562; *see also Eldridge*, 42 S.W.3d at 85. We have examined the responses to the Rule 26 interrogatories and the subsequent pre-trial changes to Dr. Callahan’s testimony. We agree with the plaintiffs that there are inconsistencies in his testimony, and the changes thereto, but we also find that Dr. Callahan explained the inconsistencies to the plaintiffs’ counsel prior to trial. More importantly, we do not find the underlying facts or data to be untrustworthy, and therefore, we find no error with the trial court’s decision. The appropriate remedy, as the trial court noted, was for the plaintiffs’ counsel to vigorously cross-examine Dr. Callahan on the changes complained of. As the trial court commented, the pre-trial changes to his testimony were “fair game” on cross-examination, which would afford the jury the opportunity to determine the weight to be given Dr. Callahan’s testimony.

As for the other expert witness, Dr. Theodore Larson, the plaintiffs insist that Dr. Larson should not have been permitted to testify because his deposition was taken after the scheduling deadline had passed, which, the plaintiffs contend, caused undue prejudice to the plaintiffs by leaving them with “no time to prepare their own experts for trial.”⁵ Matters pertaining to scheduling orders are within the sound discretion of the trial court.⁶ Tenn. R. Civ. P. 16.01; *see Clarksville-Montgomery County School Sys. v. United States Gypsum Co.*, 925 F.2d 993, 998 (6th Cir. 1991) (stating the court has wide latitude to impose sanctions for a party’s failure to comply with the scheduling orders). If a party fails to obey a scheduling order, Tennessee Rule of Civil Procedure 16.06 states the trial judge “*may* make such orders with regard thereto as are just, and among others

⁴ A duty to supplement responses also may be imposed by the court. Tenn. R. Civ. P. 26.05(3).

⁵ The plaintiffs’ argument appears to be without a factual foundation, and thus without merit, because it was the plaintiffs who sought to take the discovery deposition of Dr. Larson after the deadline had passed, not the defendant.

⁶ The initial Advisory Commission Comment to Tenn. R. Civ. P. 16 explained that “The rule introduces into state practice the familiar pre-trial procedures used in the federal courts. *The use of the procedure lies within the discretion of the court.*” (emphasis added).

any of the orders provided in Rule 37.02.”⁷ (emphasis added). It is within the trial judge’s discretion to decide what orders, if any, to issue as a consequence of a party’s failure to obey a scheduling order. Advisory Commission Comment, Tenn. R. Civ. P. 16; *United States v. Rayco, Inc.*, 616 F.2d 462, 464 (10th Cir. 1980) (broad powers of enforcement inure to a pretrial order limiting issues to be tried and evidence to be introduced); Advisory Committee notes to Fed. R. Civ. P. 16(f) (The district court has discretion to impose whatever sanction it feels is appropriate, under the circumstances). The trial court’s action is reviewable under the abuse of discretion standard. *Clarksville-Montgomery County School System*, 925 F.2d at 998 (citing *Nat’l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 642 (1976)). We find no error with the trial court’s decision to allow Dr. Larson to testify at trial.

Accordingly, we affirm the trial court’s decision to deny the plaintiffs’ motions *in limine* to exclude the testimony of Drs. Callahan and Larson.

JURY INSTRUCTIONS

The plaintiffs raise two issues concerning the jury instructions given in this case: (1) the trial court failed to properly instruct the jury on the burden of proof and preponderance of the evidence and by failing to give the jury charge that was announced as the approved charge and (2) the trial court erred in allegedly giving that portion of the jury instruction at issue outside the presence of the parties and their counsel. We find these issues to be related and will address them accordingly.

Tennessee Rule of Civil Procedure 51.02 provides that a jury instruction that is erroneous because it mis-states the law and misleads the jury can be assigned as error on appeal even if the party failed to object at trial. *Wilson v. K Mart Corp.*, No. 03A01-9110-CV-346, 1992 WL 75870, at *6 (Tenn. Ct. App. Apr. 16, 1992) (citing *State ex rel. Smith v. Hoganson*, 588 S.W.3d 863 (Tenn. 1979); *Rule v. Empire Gas Corp.*, 563 S.W.2d 551 (Tenn. 1978)). “However, in order to predicate error upon an alleged *omission* in instructions given to the jury, a party must have pointed out such an omission to the trial judge at trial by a request for appropriate instruction.” *Id.* (citing *Rule*, 563

⁷ If a party fails to obey an order to provide or permit discovery, including an order made under Rule 37.01 or Rule 35, or if a party fails to obey an order entered under Rule 26.06, the court, pursuant to Tennessee Rule of Civil Procedure 37.02, may make such orders in regard to the failure as are just, and among others the following:

- (A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;
- (B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;
- (C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;
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S.W.2d at 553) (emphasis added). After a thorough review of the record, we find the plaintiffs failed to object to any omission in the trial court's jury instruction.

In instructing the jury, the trial court read the applicable medical malpractice statute. By reading this statute, the trial court instructed the jury on the claimant's burden in a medical malpractice action and briefly explained the preponderance of the evidence standard. However, as the trial judge correctly noted after the dismissal of the jury, the jury had not been fully and properly instructed on burden of proof and preponderance of the evidence as set out in the Tennessee Pattern Jury Instruction Civil 2.40 (3d ed. 1997).⁸ After the trial court recognized this omission, the plaintiffs' counsel acknowledged that he also noted the omission and yet failed to request an appropriate instruction. In fact, the plaintiffs never further mentioned the omission of the trial court or requested an appropriate instruction even though fully aware of the deficiency moments after the jury had retired to deliberate. Even when the trial court brought the jury back for a "dynamite charge," the plaintiffs never objected to the incomplete jury instruction or requested an appropriate charge.

The plaintiffs are not permitted to wait until after an adverse verdict to complain about known omissions in the jury instruction. Because the jury charge was not incorrect or misleading but merely incomplete, it was the plaintiffs' duty to submit a special request for additional instructions on burden of proof and preponderance of the evidence. *Rule*, 563 S.W.2d at 554. Their failure to do so constitutes a waiver of the inadequacy of the jury instruction. *See Id.*

The plaintiffs also argue that the trial court erred in failing to give the jury charge that was announced as the approved charge. However, we find nothing in the record detailing the "approved" charge. What is in the record appears to be a compilation of various sections of the Tennessee Pattern Jury Instructions of which relevant portions are blank. The foregoing notwithstanding, the plaintiffs should have objected to any omissions in the jury charge as given to the jury at trial. *See Rule*, 563 S.W.2d at 554. The plaintiffs' failure to do so waived the issue on appeal.

Lastly, there is no evidence in the record that the trial judge gave any instruction to the jury outside the presence of the parties and their counsel. The only reference to this in the record is in a pleading filed by the plaintiffs in support of their motion for a new trial, and is unsupported by affidavits or other competent evidence. Accordingly, we find no merit to this issue on appeal.

DENIAL OF DEFENDANT'S MOTION FOR DISCRETIONARY COSTS

At the conclusion of the trial, Dr. Coker filed a motion seeking discretionary costs pursuant to Tenn. R. Civ. P. 54.04 in the amount of \$20,575.04. Following a hearing, the trial court denied the motion for discretionary costs. Dr. Coker contends this was error.

⁸As T.P.I. 3 - Civil 2.40 is included in the record amongst other portions of the jury instructions, we assume on appeal that this was the instruction agreed to by the parties as to the burden of proof and preponderance of the evidence.

The Tennessee Rules of Civil Procedure provide that costs included in the “bill of costs” prepared by the clerk of the trial court “shall be allowed to the prevailing party unless the court otherwise directs.” Tenn. R. Civ. P. 54.04(1) (emphasis added). Additional costs, known as “discretionary costs,” are also allowable, but only in the trial court’s discretion. Tenn. R. Civ. P. 54.04(2).⁹ Therefore, a party is not entitled to discretionary costs simply because that party prevails. *Duran v. Hyundai Motor Am., Inc.*, No. M2006-00282-COA-R3-CV, 2008 WL 425942, at *28 (Tenn. Ct. App. Feb. 13, 2008) (no Tenn. R. App. P. 11 application filed) (citing *Scholz v. S.B. Int’l, Inc.*, 40 S.W.3d 78, 85 (Tenn. Ct. App. 2000); *Sanders v. Gary*, 989 S.W.2d 343, 345 (Tenn. Ct. App. 1998)). To the contrary, the particular equities of the case may influence the trial court’s decision to award or deny discretionary costs. *Perdue v. Green Branch Mining Co.*, 837 S.W.2d 56, 60 (Tenn. 1992). The party seeking discretionary costs has the burden of convincing the trial court that it is entitled to these costs. *Carpenter v. Klepper*, 205 S.W.3d 474, 490 (Tenn. Ct. App. 2006); *Stalsworth v. Grummons*, 36 S.W.3d 832, 835-36 (Tenn. Ct. App. 2000).

Whether to award discretionary costs is a decision that addresses itself to the trial court’s sound discretion. *Owens v. Owens*, 241 S.W.3d 478, 497 (Tenn. Ct. App. 2007); *Stalsworth*, 36 S.W.3d at 835. Accordingly, we employ the abuse of discretion standard, a very deferential standard, when reviewing a trial court’s decision to award or deny discretionary costs. On appeal, the party who takes issue with the trial court’s decision regarding discretionary costs has the burden of demonstrating the trial court abused its discretion. *Duran*, 2008 WL 425942, at *28 (citing *JPMorgan Chase Bank v. Franklin Nat’l Bank*, No. M2005-02088-COA-R3-CV, 2007 WL 2316450, at *3 (Tenn. Ct. App. Aug. 13, 2007) (no Tenn. R. App. P. 11 application filed)). The abuse of discretion standard does not permit the appellate court to substitute its judgment for that of the trial court. *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001) (citing *Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 927 (Tenn. 1998)).

“A trial court abuses its discretion only when it applies an incorrect legal standard, or reaches a decision which is against logic or reasoning that causes an injustice to the party complaining.” *Id.* (internal quotation omitted). “Under the abuse of discretion standard, a trial court’s ruling ‘will be upheld so long as reasonable minds can disagree as to the propriety of the decision made.’” *Id.* (quoting *State v. Scott*, 33 S.W.3d 746, 752 (Tenn. 2000); *State v. Gilliland*, 22 S.W.3d 266, 273 (Tenn. 2000)).

Rule 54.04 expressly provides that discretionary costs are only allowable “in the court’s discretion.” Tenn. R. Civ. P. 54.04(2) (emphasis added). There is nothing in the record to suggest that the trial court applied an incorrect legal standard, and we find nothing illogical about the trial court’s decision to deny Dr. Coker motion for discretionary costs. To the contrary, we believe reasonable minds could disagree as to the propriety of the trial court’s decision and, as the reviewing

⁹Discretionary costs are limited to those costs identified in Tenn. R. Civ. P. 54.04(2) and include “reasonable and necessary court reporter expenses for depositions or trial, reasonable and necessary expert witness fees for depositions (or stipulated reports) and for trials, reasonable and necessary interpreter fees for depositions or trials, and guardian ad litem fees.” Tenn. R. Civ. P. 54.04(2).

court, we are not permitted to substitute our own judgment for that of the trial court in discretionary matters. Therefore, we find no error in the trial court's denial of Dr. Coker's motion for discretionary costs.

IN CONCLUSION

The judgment of the trial court is affirmed, and this matter is remanded with costs of appeal assessed against both parties equally.

FRANK G. CLEMENT, JR., JUDGE